

File: PROCUREMENTLEGISLATIVE ANALYSIS~~SECRET~~Bill No. S. 548 Report No. _____ Companion No. _____Title: Small Business Act of 1983Subject: small business/contracting out federal functionsAmends. freestanding

Contacts. _____

Conclusion: ☒ No Agency objection☐ Agency objection and/or needs amendment

Analysis: This bill does very little of anything, the bulk of it being laudatory findings concerning the worth of small business.

What it does do is to require the President each year to make a study of the activities performed by the federal government which could better be ~~xxx~~ performed by small business and of the cost savings which could be realized thereby. This is to be made into a report to the Congress and, along with the report, is to be a schedule for transferring those activities to small business with an emphasis on contracting out.

Presumably, such a study would not include any Agency activities. Accordingly, the Agency has no objection to this bill.

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98TH CONGRESS
1ST SESSION

S. 548

Entitled the "Small Business Act of 1983".

IN THE SENATE OF THE UNITED STATES

FEBRUARY 22 (legislative day, FEBRUARY 14), 1983

Mr. BENTSEN introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

A BILL

Entitled the "Small Business Act of 1983".

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the "Small Business Act of
5 1983".

6 **SEC. 2. FINDINGS AND PURPOSE.**

7 (a) The Congress finds that—

8 (1) small business is the economic heart of the
9 United States, creating 87 per centum of all new jobs,
10 employing 63 per centum of all workers, and responsi-
11 ble for a majority of all innovative activity, and almost
12 one-half of the gross national product;

1 (2) small business is bearing the brunt of the re-
2 cession which has created extraordinary hardship
3 among small business owners and unemployment
4 among small business workers;

5 (3) the Federal Government is exacerbating these
6 hardships by performing many activities in direct com-
7 petition with small business;

8 (4) the General Accounting Office and other Fed-
9 eral entities have documented numerous instances
10 where activities being performed by the Federal Gov-
11 ernment could more efficiently be performed by the pri-
12 vate sector;

13 (5) permitting small business to more efficiently
14 perform activities now conducted by Federal Govern-
15 ment will reduce the cost of Government, reduce taxes,
16 and improve the economic condition of our crucial
17 small business sector; and

18 (6) the purpose of this Act is to reduce Federal
19 spending by encouraging the transfer of those Federal
20 agency activities to small business which can more effi-
21 ciently be performed by the private sector.

22 **SEC. 3. ANNUAL EVALUATION AND REPORT.**

23 By January 31 of each year, the President shall submit
24 a report to the Congress. The report shall contain—

3

1 (a) a description of activities performed in the pre-
2 vious calendar year by the Federal Government which
3 could be more efficiently performed by small business;
4 and

5 (b) an estimate of the potential cost savings to the
6 Government and taxpayers of conducting such activi-
7 ties under contract with small business.

8 **SEC. 4. TRANSFER OF GOVERNMENT ACTIVITIES TO THE PRI-**
9 **VATE SECTOR.**

10 The President shall include in the report required pursu-
11 ant to section (3) a schedule for transferring those activities
12 identified in section 3(a) to the private sector, with an empha-
13 sis on contracting for the performance of such activities with
14 small business firms.

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REFERENCE

SEC. 507. With respect to any function transferred by this Act and exercised on or after the effective date of this Act, reference in any other Federal law to any department, commission, or agency or any officer or office the functions of which are so transferred shall be deemed to refer to the Commission, Chairman, other official, or component of the Commission to which this Act transfers such functions.

AMENDMENTS

Sec. 508. (a) Section 5313 of title 5, United States Code, is amended by adding at the end thereof the following:

"Chairman, Environmental Protection Commission."

(b) Section 5314 of title 5, United States Code, is amended by adding at the end thereof the following:

"Commissioners, Environmental Protection Commission."

TRANSITION

Sec. 509. With the consent of the appropriate department or agency head concerned, the Commission is authorized to utilize the services of such officers, employees, and other personnel of the departments and agencies from which functions or offices have been transferred to the Commission, and funds appropriated to such functions or offices for such period of time as may reasonably be needed to facilitate the orderly implementation of this Act.

TITLE VI—EFFECTIVE DATE AND INTERIM APPOINTMENTS

EFFECTIVE DATE

Sec. 601. (a) The provisions of this Act shall take effect one hundred and eighty days after the Chairman takes office, or on any earlier date on or after October 1, 1983, as the President may prescribe and publish in the Federal Register, except that at any time on or after October 1, 1983—

(1) any of the officers provided for in title II of this Act may be nominated and appointed, as provided in such title; and

(2) the Commission may promulgate regulations pursuant to section 505(b)(2) of this Act.

(b) Funds available to any department or agency (or any official or component thereof), the functions or offices of which are transferred to the Commission by this Act, may, with the approval of the Director of the Office of Management and Budget, be used to pay the compensation and expenses of any officer appointed pursuant to this title and other transitional and planning expenses associated with the establishment of the Commission or transfer of functions or offices thereto until such time as funds for such purposes are otherwise available.

INTERIM APPOINTMENTS

Sec. 602. (a) In the event that one or more officers required by this Act to be appointed by and with the advice and consent of the Senate shall not have entered upon office on the effective date of this Act and notwithstanding any other provisions of law, the President may designate an officer in the executive branch to act in such office for one hundred and twenty days or until the office is filled as provided in this Act, whichever occurs first.

(b) Any officer acting in an office in the Commission pursuant to the provisions of subsection (a) shall receive compensation at the rate prescribed for such office under this Act.

SUMMARY OF THE ENVIRONMENTAL PROTECTION ACT OF 1983

I. Purposes: To provide for the reorganization of the Environmental Protection

Agency by the establishment of an independent regulatory commission to be known as the Environmental Protection Commission.

II. Structure of Commission:

There will be a five-member Commission appointed by the President, with the advice and consent of the Senate. One of the members shall be designated by the President as Chairman. Not more than three members shall be of the same political party.

The length of term of each member shall be seven years, except for the members first taking office whose terms will (as designated by the President) end in three, four, five, six and seven years, respectively.

The Commission shall be composed of members who, by reason of training, education, or experience, are qualified to carry out the functions of the Commission. The President shall nominate persons for the Commission to ensure that the Commission membership shall be balanced, with broad representation of various interest, backgrounds, occupations, and experience appropriate to the functions and responsibilities of the Commission.

III. Functions of the Commission: The Commission's principal responsibilities shall be limited to policy formulation, rulemaking, adjudication and issuance of orders. The Commission will not be involved in purely administrative or managerial functions.

IV. Transfer of Functions to the Commission: There are to be transferred to the Commission all functions of the Environmental Protection Agency.

V. Administrative Provisions: The day-to-day management of the agency will be delegated to an executive director of operations. The Chairman of the Commission shall initiate the appointment of the executive director, subject to the approval of the Commission; and the Chairman or any member of the Commission may initiate an action for removal, subject to Commission approval.

VI. Commission Independence:

The Commission shall be required to make concurrent budget submissions to Congress and the executive branch.

The Commission will be allowed to submit to Congress legislative recommendations, testimony or comments without clearance by the Office of Management and Budget.

The Commission will be allowed to control its own litigation and represent itself in court.

VII. Commission Rulemaking: Commission rulemaking is to be a hybrid between informal rulemaking and formalized adversarial procedures. (The bill incorporates the same rulemaking procedures as are found in Section 307 of the Clean Air Act)

VIII. Responsiveness to Congress and the President: The Commission is required to submit a comprehensive annual report to Congress and the President. ●

By Mr. BENTSEN:

S. 548. A bill entitled the "Small Business Act of 1983"; to the Committee on Governmental Affairs.

THE SMALL BUSINESS ACT OF 1963

● Mr. BENTSEN. Mr. President, just over 1 year ago, I introduced legislation designed to transfer economic activities, where feasible, to small business from the Federal Government.

Over the past several decades, we have seen a burgeoning growth in activities being performed by Federal agencies. Some of it can only be done by Federal workers. But evidence has increasingly come to light showing

that much of this work could be done by the private sector, as well. Indeed, it could be done more efficiently there, saving revenues and reducing the skyrocketing Government deficit. Studies by the Defense Department, the Office of Management and Budget, and the General Accounting Office have found that billions of dollars in Federal funds could be saved if agencies contracted out to small business various categories of work, ranging from printing to custodial work to credit collection.

This evidence has come to light over the past several years. Yet, Congress has paid little or no heed to the implications of it for our hard-pressed small business sector. In fact, the wisdom and need to transfer Government activities to small businesses have never been greater; 1982 was the worst year for small business since the Great Depression era. The job-creating work of that sector ground to a halt under the twin heels of soaring interest costs and sagging demand. Bankruptcies skyrocketed and the most innovative and vigorous sector of our economy struggled to keep afloat.

That struggle continues today. And part of the answer is to rapidly shift those Government activities to the private sector which can more efficiently be done there.

That is the purpose of the Small Business Act I am introducing now. Small business creates as many as 87 out of 100 new jobs. The 12 million small businesses employ 63 percent of our workforce and account for one-half of all our innovations.

They can do many jobs more efficiently than can the Government. As I said in 1981, while introducing similar legislation, the GAO identified over \$4 billion in uncollected debts since 1976, owed the Government which were collectible using private credit agency practices.

The GAO identified \$11.7 million which annually could be saved at Federal hydroelectric projects by adopting the automation practices of private utilities.

DOD found it could cut its employment rolls by 11,000 and save \$90 million annually by transferring 264 activities to private contractors.

The GAO found that up to \$300 million could be saved by adopting private-sector day care standards for HEW.

The GAO found that the General Services Administration could cut its custodian costs by one-third or almost \$30 million in 1980 alone by contracting for such services through the private sector.

OMB testified before the Joint Economic Committee on October 28, 1981, that:

The government currently operates thousands of commercial or industrial activities with an annual operating cost in excess of \$20 billion and with a similar amount of capital investment. The vast majority of

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jections, of the incidence of health and other effects to the population resulting from environmental causes, with a breakdown, insofar as practicable, among the various sources of such effects;

(2) a list of environmental rules prescribed or in effect during such year;

(3) an evaluation of the degree of observance of environmental rules, including a list of enforcement actions, court decisions, and compromises of alleged violations, by location and company name;

(4) a summary of outstanding problems confronting the administration of the functions of the Commission in order of priority;

(5) an analysis and evaluation of public and private environmental research activities;

(6) a list, with a brief statement of the issues, of completed or pending judicial actions of the Commission;

(7) the extent to which technical information was disseminated to the scientific and commercial communities and environmental information was made available to the public;

(8) the extent of cooperation between Commission officials and representatives of industry and other interested parties in the implementation of the functions of the Commission, including a log or summary of meetings held between Commission officials and representatives of industry and other interested parties;

(9) an appraisal of significant actions of State and local governments relating to the responsibilities of the Commission;

(10) with respect to voluntary environmental standards for which the Commission has participated in the development through monitoring or offering of assistance and with respect to voluntary environmental standards relating to health risks that are the subject of regulatory action by the Commission, a description of—

(A) the number of such standards adopted;

(B) the nature and number of the industries and practices which are the subject of such standards;

(C) the effectiveness of such standards in reducing potential harm from environmental causes;

(D) the degree to which staff members of the Commission participate in the development of such standards;

(E) the amount of resources of the Commission devoted to encouraging development of such standards; and

(F) such other information as the Commission determines appropriate or necessary to inform the Congress on the current status of the voluntary environmental standard program; and

(11) such recommendations for additional legislation as the Commission deems necessary to carry out the purposes of this Act.

TITLE V—TRANSITIONAL, SAVINGS, AND CONFORMING PROVISIONS

TRANSFER AND ALLOCATION OF APPROPRIATIONS AND PERSONNEL

SEC. 501. (a) Except as otherwise provided in this Act, the personnel employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balance of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to, or to be made available in connection with the functions and offices, or portions thereof transferred by this Act, subject to section 202 of the Budget and Accounting Procedures Act of 1950, shall be transferred to the Commission for appropriate allocation. Unexpended funds transferred pursuant to this subsection shall be used only for the purposes for which the funds were originally authorized and appropriated.

(b) Positions expressly specified by statute or reorganization plan to carry out functions or offices transferred by this Act, personnel occupying those positions on the effective date of this Act, and personnel authorized to receive compensation in such positions at the rate prescribed for offices and positions at level I, II, III, IV, or V of the Executive Schedule (5 U.S.C. 5315-5316) on the effective date of this Act, shall be subject to the provisions of section 503.

EFFECT ON PERSONNEL

SEC. 502. (a) Except as otherwise provided in this Act, the transfer pursuant to this title of full-time personnel (except special Government employees) and part-time personnel holding permanent positions shall not cause any such employee to be separated or reduced in grade or compensation for one year after the date of transfer to the Commission.

(b) Any person who, on the day preceding the effective date of this Act, held a position compensated in accordance with the Executive Schedule prescribed in chapter 53 of title 5, United States Code, and who, without a break in service, is appointed in the Commission to a position having duties comparable to the duties performed immediately preceding such appointment shall continue to be compensated in such new position at not less than the rate provided for such previous position, for the duration of the service of such person in such new position.

AGENCY TERMINATIONS

SEC. 503. (a) On the effective date of this Act, the Environmental Protection Agency shall terminate.

(b) Each position which was expressly authorized by law, or the incumbent of which was authorized to receive compensation at the rate prescribed for level I, II, III, IV, or V of the Executive Schedule (5 U.S.C. 5315-5316), in an office terminated pursuant to this Act shall also terminate.

INCIDENTAL TRANSFERS

SEC. 504. The Director of the Office of Management and Budget, at such time or times as the Director shall provide, is authorized and directed to make such determinations as may be necessary with regard to the functions, offices, or portions thereof transferred by this Act, and to make such additional incidental dispositions of personnel, assets, liabilities, grants, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with such functions, offices, or portions thereof, as may be necessary to carry out the provisions of this Act. The Director shall provide for the termination of the affairs of all entities terminated by this Act and for such further measures and dispositions as may be necessary to effectuate the purposes of this Act.

SAVINGS PROVISIONS

SEC. 505. (a) All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses, and privileges—

(1) which have been issued, made, granted, or allowed to become effective by the President, any Federal department or agency or official thereof, or by a court of competent jurisdiction, in the performance of functions which are transferred under this Act to the Commission, and

(2) which are in effect at the time this Act takes effect, shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with the law by the President, the Commission or the Chairman, or other authorized official,

a court of competent jurisdiction, or by operation of law.

(b)(1) The provisions of this Act shall not affect any proceedings, including notices of proposed rulemaking, or any application for any license, permit, certificate, or financial assistance pending on the effective date of this Act before any department, agency, commission, or component thereof, functions of which are transferred by this Act; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, appeals shall be taken therefrom, and payments shall be made pursuant to such orders, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by the Commission or the Chairman, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(2) The Commission is authorized to promulgate regulations providing for the orderly transfer of proceedings continued under paragraph (1) to the Commission.

(c) Except as provided in subsection (e)—

(1) the provisions of this Act shall not affect suits commenced prior to the effective date of this Act, and

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) No suit, action, or other proceeding commenced by or against any officer in the official capacity of such individual as an officer of any department or agency, functions of which are transferred by this Act, shall abate by reason of the enactment of this Act. No cause of action by or against any department or agency, functions of which are transferred by this Act, or by or against any officer thereof in the official capacity of such officer shall abate by reason of the enactment of this Act.

(e) If, before the date on which this Act takes effect, any department or agency, or officer thereof in the official capacity of such officer, is a party to a suit, and under this Act any function of such department, agency, or officer is transferred to the Commission or any other official of the Commission, then such suit shall be continued with the Commission or other appropriate official of the Commission substituted or added as a party.

(f) Orders and actions of the Commission or the Chairman in the exercise of functions transferred under this Act shall be subject to judicial review to the same extent and in the same manner as if such orders and actions had been by the agency or office, or part thereof, exercising such functions immediately preceding their transfer. Any statutory requirements relating to notice, hearings, action upon the record, or administrative review that apply to any function transferred by this Act shall apply to the exercise of such function by the Commission or the Chairman.

SEPARABILITY

SEC. 506. If any provision of this Act or the application thereof to any person or circumstance is held invalid, neither the remainder of this Act nor the application of such provision to other persons or circumstances shall be affected thereby.

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these activities have never been subject to competition.

If these activities were subject to the cost comparison studies required by A-76, we estimate that 154,000 personnel spaces could be converted to contract operations with a five-year cumulative savings between Fiscal Year 1982 and 1987 in excess of \$3 billion. These savings will continue to accrue thereafter.

The circular A-76 referred to in that testimony is an OMB directive first issued in 1967 and revised in 1979. It admonishes Federal agencies to utilize private-sector contractors wherever possible—an admonition seemingly honored less than faithfully by the Federal bureaucracy.

EXPLANATION OF LEGISLATION

It is time we brought the promise of Government efficiency and a more robust small business sector to completion. That is the purpose of my Small Business Act of 1983.

It requires the President to establish a consistent data base of all Government activities which could better be performed by small business. He is obligated under my legislation to report such data annually to Congress. And that report must contain an estimate, as well, of potential cost savings to taxpayers should these activities be done by the small business sector.

Finally, my bill requires the President to establish and maintain a schedule for transferring these activities to small business.

There are no more useful and appropriate steps Congress could immediately take to boost the private sector and reduce the cost of government than to enact my legislation. And I encourage my colleagues to join with me in reducing the deficit, trimming Federal spending, and giving a badly needed and overdue stimulus to small business.

Mr. President, I ask unanimous consent that the Small Business Act of 1983 be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 548

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Small Business Act."

SECTION 1. SHORT TITLE.

This Act may be cited as the "Small Business Act."

SEC. 2. FINDINGS AND PURPOSE.

(a) The Congress finds that:

(1) small business is the economic heart of the United States, creating 87 percent of all new jobs, employing 63 percent of all workers, and responsible for a majority of all innovative activity, and almost one-half of the Gross National Product;

(2) small business is bearing the brunt of the recession, which has created extraordinary hardship among small business owners and unemployment among small business workers;

(3) the Federal Government is exacerbating these hardships by performing many activities in direct competition with small business;

(4) the General Accounting Office and other Federal entities have documented numerous instances where activities being performed by the Federal Government could more efficiently be performed by the private sector; and

(5) permitting small business to more efficiently perform activities now conducted by the Federal Government will reduce the cost of government, reduce taxes, and improve the economic condition of our crucial small business sector.

(6) the purpose of this Act is to reduce Federal spending by encouraging the transfer of those Federal agency activities to small business which can more efficiently be performed by the private sector.

SEC. 3. ANNUAL EVALUATION AND REPORT.

By January 31 of each year, the President shall submit a report to the Congress. The report shall contain:

(a) a description of activities performed in the previous calendar year by the Federal Government which could be more efficiently performed by small business; and

(b) an estimate of the potential cost savings to the government and taxpayers of conducting such activities under contract with small business.

SEC. 4. TRANSFER OF GOVERNMENT ACTIVITIES TO THE PRIVATE SECTOR.

The President shall include in the report required pursuant to section (3) a schedule for transferring those activities identified in section 3(a) to the private sector, with an emphasis on contracting for the performance of such activities with small business firms.

By Mr. HATCH (for himself, Mr. DeCONCINI, Mr. EAST, Mr. HEFLIN, Mr. LAXALT, Mr. LEAHY, Mr. BAUCUS, Mr. GRASSLEY, Mr. DOLE, and Mr. LUGAR):

S. 549. A bill to amend title II, United States Code, to improve the protections for shopping centers and their tenants under the Bankruptcy Code; to the Committee on the Judiciary.

SHOPPING CENTER TENANT BANKRUPTCY PROTECTION IMPROVEMENTS ACT OF 1983

● Mr. HATCH. Mr. President, with this speech, I am pleased to announce the introduction of the Shopping Centers Tenants Bankruptcy Improvements Act of 1983, which last year passed the Senate unanimously. This bill will remedy serious problems caused shopping centers and their solvent tenants by the administration of the Bankruptcy Code. These problems were created by changes in the bankruptcy law made by the enactment of the Bankruptcy Code. The Bankruptcy Code, enacted by the Bankruptcy Reform Act of 1978, was the first major revision of the bankruptcy laws of the United States since 1938, and its enactment was the culmination of an effort that extended over a number of years. The code made numerous substantive changes in the law of bankruptcy as well as in the administration of bankruptcy cases.

One of these changes made unenforceable lease clauses permitting a landlord to regain possession of premises leased to a bankrupt tenant. However, Congress recognized the unique interrelationship between shopping center tenants and the great potential

for harm to shopping centers and their solvent tenants arising from the ability of a bankrupt tenant to assume or assign a shopping center lease. To protect this important sector of the economy from unnecessary economic harm, Congress enacted in section 365 of the code certain protective provisions for shopping centers and their tenants. Unfortunately, these provisions have not accomplished these purposes. As a result, I am sponsoring this bill to carry out Congress intent as stated in the 1978 act and to strengthen the protections for shopping centers under the Bankruptcy Code.

Mr. President, it is indisputable that shopping centers are an important sector of U.S. retail trade. In 1981, in the United States there were approximately 22,750 shopping centers with an estimated 1,255,000 retail stores. Approximately 42 percent of all U.S. retail trade amounting to \$439 billion was conducted in shopping centers. In the coming year, 60 percent of all new retail space and 88 percent of new department store space is likely to be constructed in shopping centers.

The problems for shopping centers and their tenants caused by the present administration of the code are serious and widespread. Conservatively estimated, 15,000 shopping centers have had one or more tenants involved in bankruptcies in 1981. Under this estimate, approximately 65 percent of all shopping centers were involved with the bankruptcies of 17,000 retail stores.

In a shopping center, the public benefits from the convenience and efficiency of one-stop shopping and frequently from the direct competition among the retail merchants who are tenants of the shopping center. The commercial success of the enterprise depends on the ability of all of the tenants to function as one entity. The shopping center is defined by its tenant mix which is carefully designed to serve a trade area and to draw sufficient customers from that trade area to support the rents paid by the tenants.

To make this enterprise work, each tenant must fully operate its store for a minimum number of hours, engage in specified lines of business, advertise in ways that draw customers to the shopping center, and maintain certain standards of appearance and operation. This joint effort is cemented by a series of master agreements, entered into by all the parties involved in a shopping center, that set forth in precise terms the rights and obligations of each party.

As shopping centers have evolved, they have become larger and more sophisticated in design, construction and concept, involving tens of millions of dollars of investments by developers, tenants, and financial institutions. Once again, the linchpin of this entire operation is the freely accepted and

openly negotiated contractual agreements among the parties.

While the operation of the bankruptcy law necessarily alters contractual relationships, these alterations have direct and potentially crippling impacts on other shopping center businesses, and consequently, must be strictly limited and minimized.

As Congress recognized in enacting the 1978 act, shopping center leases are distinct from other leases of real property in that each lease arrangement memorializes not only the bilateral interests of the tenant and the landlord, but the multilateral relationships of every other tenant in the shopping center. The interdependence among the tenants of a shopping center means that the bankruptcy of one tenant will seriously affect the other tenants.

Shopping center leases frequently are made on a long-term basis in consideration of the large investment usually made by tenants in establishing their various enterprises. These long-term lease agreements put the landlord into a position unlike a merchandise creditor or a financial institutional lender. A shopping center landlord, unlike other creditors, cannot make periodic reviews of the financial condition of his customers and unilaterally terminate creditor loans whenever it appears that the customer's credit is impaired. These long-term contracts obligate both parties to honor their agreements to protect the delicate interrelationships which form the foundation for the shopping center's success.

Moreover, shopping center leases frequently contain anchor clauses which commit the tenant to a lease term only so long as another designated tenant remains in the shopping center. These provisions further manifest the symbiotic, interdependent nature of a shopping center.

Mr. Nathan B. Feinstein testifying before the Courts Subcommittee of the Senate Judiciary Committee in hearings held on my bill last year, cap-sulized this principle beautifully:

Tenants locate in shopping centers based on the complementary ability of the various stores in the shopping center to draw customers. One looks to the advertising and the merchandising techniques of the larger stores (anchor stores) in choosing a shopping center. One considers carefully the cooperative advertising, the center promotions, the the parking and other common services. The shopping center and its tenant's association rely on a continuing stream of payments from tenant-shopkeepers to meet the snow removal, air conditioning, heating, parking lot maintenance, advertising, mortgage, tax and other obligations of the center. When the stream of payments is disrupted for a significant period of time, every shopowner suffers by the lack of maintenance and uncertain financial viability of the center. When an anchor store closes its doors and stops advertisements, the smaller stores suffer the lack of patronage. When Saks Fifth Avenue moves out as anchor store and John's Bargains moves in, the small independent fashion boutiques die. When the future of the

center is in doubt, the businessman-tenant does not know how to order for the season.

These multifarious symbiotic relationships in the shopping center are in peril whenever any tenant suffers financial hardship or fails. The continued vitality of those relationships and the businesses in the center depends on the system our bankruptcy policies create to swiftly fill vacancies and fairly acknowledge the interests of remaining solvent tenants.

Prior to the enactment of the 1978 act, the interests of the shopping center and its other tenants were protected against prolonged damage from a single tenant's bankruptcy by the contractual power of the lessor to control the disposition of the lease. As I stated earlier, however, the 1978 act made such lease clauses unenforceable. Nonetheless, Congress recognized the special bankruptcy problems in shopping centers by including in the code special provisions governing unexpired shopping center leases. These provisions specify various assurances which the trustee must make in order to assume or assign an unexpired lease of the debtor.

Unfortunately, experience with these provisions indicates that they have not functioned as originally intended by Congress. Under the Bankruptcy Code, the shopping center and its solvent tenants may suffer serious economic harm or even business failure if a bankrupt tenant closes its store for an extended period of time or assigns its lease to a business which does not conform to the lease's use clause thus disrupting the shopping center's tenant mix. These problems are compounded when the bankrupt tenant is a major store in the shopping center.

This legislation seeks to make effective the protections that Congress intended to provide shopping centers and their tenants in the 1978 act. The leasehold management amendments accomplish this by removing latent defects in certain provisions of the Bankruptcy Code. These perfecting amendments do not change the policy of the code; they implement that policy. By making effective these protections, the bill strikes the proper balance between the interests of the solvent tenants of a shopping center and its insolvent tenants.

At the May 3, 1982, hearing on this bill, testimony was received from the International Council of Shopping Centers—the trade association of the shopping center industry—from individual shopping center developers, and from the president of the merchants association of a shopping center which had experienced tenant bankruptcies. In addition, a statement was submitted for the record by the National Retail Merchants Association, which represents the small business tenants of shopping centers.

Shopping centers and shopping center tenants support this legislation because the administration of bank-

ruptcies under the code has resulted in numerous cases where shopping center tenant space was left closed for an extended period of time, where the trustee did not perform the debtor's obligations under the lease, or where shopping center space was assigned to a business not in conformance with the use clause.

The purpose of the bill is to remedy several substantive and technical problems relating to the operation and assignment of shopping center tenant space which have arisen. This legislation's solutions to them are as follows:

First. Time limit to assume or reject lease.

Problem. Under the 1978 act, in a chapter 7 (liquidation) case the trustee is required to decide within 60 days of the order for relief whether to assume or reject an executory contract or unexpired lease. However, no time limit is established for cases outside chapter 7. Consequently, an extended period of time often passes before the trustee makes such a decision in a chapter 11 (reorganization) case. During this dead time, the trustee often does not operate the space, or operates it at a much reduced level, thereby causing substantial economic harm to other tenants in the shopping center.

The testimony of witnesses representing shopping centers and shopping center tenants at the hearing and the statement for the record of the National Retail Merchants Association (NRMA) make clear that this is one of the major problems of shopping centers and their tenants caused by the administration of tenant bankruptcies under the code.

The vacancy of any tenant space for an extended period of time can seriously disrupt an entire shopping center. Customer traffic is reduced not only by the decreased supply of products or services, but also by the less pleasant atmosphere cause by boarding up a portion of the shopping center. Where the vacant space is that of an anchor store, the effect on the shopping center and its other tenants can be devastating.

For example, Mr. John Holmes, president of a shopping center merchant's association in Frederick, Md., testified:

... to explain the damage to the other tenants of the Frederick Shopping Center resulting from the closing of these stores and the inability of the shopping center to release this space to operating businesses for a period of time.

He then recounted that one store in the Frederick center was vacant for over 9 months and another for nearly 5 months. He noted that:

I have difficulty understanding how other tenants ... survived. Even the comparably short time [the bankrupt stores were closed] severely damaged the business of many of the merchants of this shopping center, and in many cases the stores have not yet recovered.

He pointed out that some neighboring stores suffered 28 and 26 percent